Comment
on the
Second Delta Vision Draft (Revised October 16, 2007)

Submitted by the
Capital Center for Government Law & Policy
University of the Pacific McGeorge School of Law [*]

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We thank the Delta Vision Task Force for the opportunity to comment on the staff's second revised draft Delta Vision. The draft is a very good start towards a final report and vision.

The draft Delta Vision would be a stronger document if it included as foundational elements the fundamental constitutional principles that animate California water law and policy. The draft's overall focus on sustainability supported by integrated planning and accommodation between ecosystem protection, water provision and other socially and economically beneficial uses is more than just a good idea. In our judgment, that sophisticated approach – an approach that envisions a delta and a delta governance process that is resilient to changing environmental and social conditions – perfectly reflects the constitutional foundations of California water law, the principle of "reasonable use" and the obligation to manage resources that impact water quality and use as a "public trust."

Expressly incorporating the reasonable use and public trust doctrines into the draft Delta Vision as fundamental elements would establish a solid legal framework and foundation for decisions about the future of the Delta. We note that the public trust doctrine was added to the second revised draft in a single paragraph on page 10, but we believe this passing reference does not take greatest advantage of the alignment between the reasonable use and public trust doctrines and the Task Force's core vision. We urge the

[*] The Capital Center for Government Law & Policy wishes to acknowledge and thank the California Center for Environmental Law and Policy at the University of California Berkeley School of Law for hosting, on August 7, 2007, a meeting of the co-authors of this comment along with Phil Isenberg (Chair of the Delta Vision Task Force), Richard Frank (Member of the Delta Vision Task Force and Director of the California Center), John Kirlin (Executive Director of the Delta Vision Task Force), and Joseph L. Sax (James H. House and Hiram H. Hurd Professor of Environmental Regulation, Emeritus, University of California, Berkeley School of Law), where the work of the Task Force was discussed.
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Task Force to incorporate these foundational doctrines into the formulation of its core vision and the final Delta Vision document.

Reasonable Use Doctrine

The foundation of California water law is the doctrine of reasonable use. The reasonable use requirement has been a part of California's water rights system from the earliest days of statehood, *see* Brian E. Gray, *In Search of Bigfoot: The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 Hastings Con. L.Q. 225 (1989), and since 1928 has been part of the California Constitution. Article X, Section 2 provides:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of waters. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

The Supreme Court of California clearly and simply explained the appropriate reach and interpretation of the reasonable use doctrine in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367, as follows:

> "1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.
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> "2. Such right does not extend to the waste of water.
>
> "3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

> "4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.
>
> "The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed."

The Supreme Court has held that the determination of reasonable use must take into account not only the rights of water users, but also the broader public interest:

> "What is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment."

City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th, 1224, 1242 (quoting *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal. 2d 132, 140). Indeed, because of Article X, Section 2, "no one can have a protectible interest in the unreasonable use of water." *Id.*

Public Trust Doctrine

Of equal doctrinal status, and of even older lineage, is the "public trust doctrine," which traces its origins to Roman law in the Institutes of Justinian. The public trust doctrine provides that the State of California, as sovereign, "owns 'all of its navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people."'" *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434.

The purpose of the public trust "evolve[s] in tandem with the changing public perception of the values and uses of waterways." *Id*., 33 Cal.3d at 434. The purposes encompass navigation, commerce, fishing, hunting, bathing, swimming, boating, and general recreation. In addition, the public trust embraces "the preservation of [tidelands] in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-60. *See also National Audubon Society*, *supra*, 33 Cal.3d at 435 ("The principal values plaintiffs seek to protect, however, are recreational and ecological – the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under [*Marks*], it is clear that protection of these values is among the purposes of the public trust.").

The public trust doctrine applies to all tidelands and navigable lakes and waterways. *National Audubon*, 33 Cal.3d at 435. Of great significance to the work of the Delta

Vision Task Force, the public trust also inheres in the State's management of other resources that, although not themselves navigable, directly affect the health and sustainability of navigable waters. Thus, for example, in *National Audubon*, the court held that "the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries." *Id.*, 33 Cal.3d at 437. *See also People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138 (public trust doctrine constrained mining operations that had the effect of dumping 600,000 cubic yards of sand and gravel annually into the north fork of the American River, impairing navigation, polluting the waters, and creating danger during times of flood); *People v. Russ* (1901) 132 Cal. 102 (public trust doctrine applied to construction of dams upon nonnavigable sloughs if such dams diverted substantial quantities of water from navigable stream). *See* Harrison C. "Hap" Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law* (1980) 14 U.C. Davis L.Rev. 357, 359-360.

The State's obligation as trustee is "to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *National Audubon*, 33 Cal.3d at 441.

Reasonable Use, Public Trust and the Delta Vision

The reasonable use and public trust doctrines are reinforcing and synergistic. A use of water violative of elements of the public trust is not reasonable; accordingly, one element of the public trust cannot be pursued to the unreasonable exclusion of other elements without violating the reasonable use doctrine. Similarly, government policy-making or decisions that countenance an unreasonable use of water or waste of water are surely violative of the State's obligation to manage resources to promote public trust purposes.

Taken together, these two foundational, constitutional doctrines enjoin upon the State and all government entities within the State – executive, legislative and judicial, and state, regional and local – the obligation to protect, preserve and even restore the quality of the State's water resources for a broad range of reasonable public uses and needs, including, most significantly, ecosystem protection and water provision. Neither value can be pursued to the exclusion of the other. Instead, both values must be protected and pursued simultaneously to the extent possible.

The draft vision document accurately forecasts that this balanced approach to government action and regulatory activity will require a significant change in perspective, mind-set and organizational culture. For far too long, the regulation of activities that impact the flow and quality of water in and through the Delta has been essentially one-sided, favoring economic expansion and increased water use at the expense of environmental conditions. The reasonable use and public trust doctrines require that the State take a more measured and balanced approach, considering how it can maintain, in the long run, a sustainable environment that supports a healthy, durable Delta which, in turn, can

support a broad range of uses. *See* Joseph L. Sax, *Bringing an Ecological Perspective to Natural Resources Law: Fulfilling the Promise of the Public Trust* in "Natural Resources Policy and Law—Trends and Directions, p. 151 (Lawrence J. MacDonnell & Sarah F. Bates eds., 1993) ("In short, legal and managerial institutions are going to have to start 'thinking ecologically,' looking broadly at ecosystems, and learning to manage them to meet both the needs of the conventional economy and those of what might be called the economy of nature – where rivers produce fish, forests provide wildlife habitat, and wetlands remain biologically productive.").

We believe that expressly incorporating these doctrines into the Delta Vision Task Force's core vision and work product may help spark more innovative, productive and successful long-range visioning and planning for the future of the Delta. *See* Brian E. Gray, *The Uncertain Future of Water Rights in California: Reflections on the Governor's Commission Report* (2005) 36 McGeorge L. Rev. 43, 62 ("These doctrines [i.e., the reasonable use and public trust doctrines] – to a greater extent than any other aspect of California water right law – have been the catalyst of some of the most important policy reform initiatives in the past quarter century."). We therefore urge the Delta Vision Task Force to recast its visioning using the reasonable use and public trust doctrines as the foundational legal framework for the Task Force's analysis and recommendations.